**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| Wholesale Competition in Regions With Organized Electric Markets | Docket Nos. RM07-19-000 and AD07-7-000 |

# COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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# COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Public Utilities Commission of the State of California ("CPUC") submits these comments in response to the Notice of Proposed Rulemaking issued by this Commission on February 22, 2008.

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## I. EXECUTIVE SUMMARY

On February 22, 2008, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a Notice of Proposed Rulemaking ("NOPR") on "Wholesale Competition in Regions with Organized Electric Markets" in Docket Nos. RM07-19-000 and AD07-7-000. The NOPR addresses four specific topic areas where possible reforms may advance the operation of organized wholesale electric markets[1]: (1) demand response and market pricing during a period of operating reserve shortage; (2) long-term power contracting; (3) market monitoring policies; and (4) the responsiveness of RTOs and ISOs to customers and other stakeholders.

The CPUC's comments will address initiatives by both the State of California and the CPUC that are responsive to many of the concerns addressed in the NOPR.[2]

As a general matter, the CPUC notes the diversity among the various organized markets, both geographically and in terms of their individual organizations and practices, which impedes FERC's ability to establish one-size fits all national criteria.[3] In this regard, the CPUC applauds FERC's efforts to provide flexibility to accommodate regional differences. At the same time, the CPUC notes that some of the areas FERC identified for possible new rules are better left to states, while others are more appropriately addressed in an RTO or ISO-specific proceeding. Other areas may in fact

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[1] Organized market regions are areas of the country in which a regional transmission organization ("RTO") or independent system operator ("ISO") operates day-ahead and/or real-time energy markets.
[2] FERC issued an Advanced Notice of Proposed Rulemaking ("ANOPR") on June 22, 2007 in the same dockets. CPUC filed comments on September 14, 2007.
[3] See, also *Notice of Intervention and Comments of CPUC under RM07-19 and AD07-7,* filed September 14,

*Footnotes continued on next page*

benefit from national, cohesive standards. It is essential FERC consider regional differences as well as existing state policies before adopting national rules.

For example, the CPUC supports the NOPR to include demand response in the ancillary services market on a basis comparable to generation resources (Section II, Demand Response, below). This is an important national step. At the same time, the CPUC also appreciates the flexibility of the NOPR's proposal in allowing state and organized markets to adopt specific measures that best suit their particular needs.

These comments will also address FERC's concern regarding increasing long-term contracting (Section III, Long-Term Power Contracting, below) and its proposal to develop an energy contract bulletin board through the RTO or ISO website.[4] While the CPUC shares FERC's concern regarding the importance of long-term contracts, it believes this proposal is unwarranted at this time, at least in California, given the substantial processes developed by the CPUC that support long-term contracting.

Regarding market monitoring (Section IV, Market Monitoring Policies, below), these comments acknowledge FERC's efforts to determine how best to ensure that the RTO and ISO market monitoring units ("MMUs") are independent and have the authority, the resources, and the access to data needed to monitor the markets effectively. While the CPUC generally supports the proposals in the NOPR intended to protect the MMUs' independence, to re-examine the definition of the MMUs' core duties, and to

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2007, p. 3.

ensure that the MMUs have the necessary access to data and resources, the CPUC opposes the proposal to remove the MMU from all mitigation functions. As for removing the MMU from "other tariff administration," the CPUC requests clarification of what tariff administration functions the Commission has in mind. Finally, while the CPUC supports improving access to market information, the CPUC opposes possibly unlawful proposals to restrict state commissions' access to data needed to fulfill their duties to protect retail consumers. State commissions must have access to the same market data that the MMUs and FERC obtain for market monitoring purposes.

These comments will also discuss the NOPR's proposal to refrain from adopting a "one size fits all" approach to improving the independence of the MMUs. As first stated in the CPUC's comments on the ANOPR, the CPUC continues to believe the "hybrid" MMU structure in the California Independent System Operator ("CAISO") is functioning well and sees no reason to alter it at this time.

Lastly, the CPUC requests FERC not take any further action regarding the fourth topic of the NOPR (Section V of these comments, below), which addresses the responsiveness of RTOs/ISOs to stakeholders and customers. FERC's proposed rules to improve customer access to the board of directors of an RTO or ISO raise potential jurisdictional conflicts. As was explained in our comments to the ANOPR, the creation of a hybrid board of directors composed of independent members and representatives of

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[4] NOPR at ¶ 129.

stakeholders is illegal and directly contradicts FERC Order No. 888 and Order No. 2000. Other reforms, such as the creation of committees of stakeholder representatives, address areas in which the California is already responsive to FERC's concerns.

## II. DEMAND RESPONSE

The CPUC applauds FERC's efforts to advance demand response as a viable resource, able to compete on an equal footing with supply side resources, and in doing so, curb market power during times of peak demand as well as defer or even eliminate need for some new transmission and generation projects. In California, energy efficiency and demand response are the top two preferred resources in the "loading order" set forth in the California's Energy Action Plan. Under the Energy Action Plan, California plans to meet energy needs by investing first in energy efficiency and demand side resources, followed by renewable resources, and only then in clean conventional electricity supply. In 2002, California set a goal of replacing 5% of peak demand with price responsive demand response by 2007.[5] Under utility-administered advance metering programs approved by the CPUC, retail electric customers will have advanced interval meters by 2012, which, coupled with dynamic rates, will enable Californians to choose how and when they use electricity, and to reduce their usage during peak hours. Demand response has been, and remains, one of the highest priorities for California as the state grapples with ways to comply with state legislation mandating reductions in carbon emissions by

[5] This 5% goal originally envisioned retail customers having advanced meters. As of 2008, advanced meters have not yet been fully deployed, thus utilities have not attained this goal. However, the 5% goal is still a part of the Commission's Long-Term Procurement Plan.

power plants. California welcomes both the interest and the support of FERC in our efforts to efficiently and robustly utilize demand side management, particularly demand response.

## A. BACKGROUND

The FERC has put forward, broadly summarized, five demand response market reform proposals: (1) require markets to accept bids from demand response resources for certain ancillary services comparable to any other resource; (2) eliminate, during a system emergency, a charge to a buyer in the energy market for taking less electric energy in the real-time market than purchased in the day-ahead market; (3) permit an ARC to bid demand response on behalf of retail customers directly into the organized energy market; (4) modify market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power; and (5) study whether further reforms are necessary to eliminate barriers to demand response in organized markets.[6]

Before discussing the specific proposals in the NOPR, it is important to understand some background on how California has structured its existing demand response programs, traditionally referred as "legacy programs." California's demand response market developed differently than many of the Eastern markets. As the CPUC advances California's demand response programs, we envision wholesale market

[6] NOPR at ¶ 10.

inclusion of demand response resources. Recently, the CPUC worked collaboratively with the CEC and the CAISO to issue a draft demand response vision document which incorporates direct wholesale market inclusion of demand response. (See Attachment A.[7]) Currently, the CPUC is undertaking a critical study of the eastern demand response markets so that both the CPUC and the CAISO are better informed on how to best structure a marketplace for demand response resources.

In California, use of third party aggregators is very different from the Eastern energy markets, where aggregators (also known as Curtailment Service Providers or Demand Response Providers) are able to supply demand response load directly into the wholesale markets. Like many other states, California's existing or legacy programs are administered by our investor-owned utilities ("IOUs"). However, many of California's programs are highly advanced and operating at a level beyond what the term "legacy program" generally connotes. Currently, third party aggregators of demand response in California, referred to as "ARCs" in the NOPR, are contracted by the IOUs to supply demand response megawatts, or "negawatts," to the utility, similar in many respects to how a peak generation plant provides power at critical times.

The CPUC's decision to use third party aggregators as contracting parties with the IOUs was brought about by several different factors. First, in the wake of the 2000-2001

[7] This is the latest publically vetted version of the Draft Vision Statement. The Draft Vision Statement is a CPUC, California Energy Commission ("CEC") and CAISO joint staff work product which has not, as yet, been adopted by any of the aforementioned entities. Staff is currently working to revise this draft before it is submitted for approval and adoption by the CAISO, CEC and CPUC. This document is being provided as an example to illustrate the interagency efforts to promote demand response in California.

energy crisis, California did not have a fully functioning wholesale market capable of offering demand response products similar to NYISO, PJM and ISO-NE. Second, the CAISO agreed not to administer demand response programs, and to utilize demand response products and services similar to the way it uses generation. Third, the CPUC recognized certain difficulties encountered by the Eastern markets in their administration of demand response programs such as measurement and verification, dispatch and settlement. Another historical barrier to demand response inclusion in CAISO's wholesale market is the market's current $400 per MWh cap.[8] Without proper market incentives, the CPUC recognized that utilization of a third party aggregator system, such as that present in the Eastern markets, would not be viable. Lastly, and most importantly, the CPUC decided to regulate the demand response market through IOU-administered programs, in an effort to protect retail ratepayers.

## B. PROPOSED REFORMS

### 1. Ancillary Services Provided by Demand Response Resources

The CPUC supports FERC's proposal to include demand response in the ancillary services market on a basis comparable to generation resources.[9] FERC has recognized the importance of small demand response resources,[10] and generally defers to the RTOs

[8] The CPUC recognizes that the CAISO markets are capped at $400 MWh in part because there is not enough demand response to mitigate market power. The CPUC also notes that under CAISO's Market Redesign and Technology Upgrade the market cap will be moved incrementally upward to a cap of $1000.
[9] NOPR at ¶ 47.
[10] NOPR at ¶ 59.

and ISOs to establish their own requirements.[11] The CPUC stresses the importance of allowing the RTOs or ISOs flexibility to modify requirements in the future, as experience is gained with demand response programs. California has been moving forward with the inclusion of demand response as an ancillary service provider. As such, it can play an important role in balancing the power grid. This added functionality can provide an additional revenue stream for demand response providers.

The CPUC has been working with the CAISO, which recognizes the capability of demand response resources to supply various ancillary service products, to convince the Western Electric Coordinating Council ("WECC") to change their standards to allow for greater participation of demand response in the wholesale market, particularly in the ancillary services market. The potential of demand response has not been fully recognized by the WECC. For example, although demand response is capable of supplying imbalance energy, spinning reserves, supplemental reserves, reactive supply, voltage control, regulation, and frequency response, the WECC will currently only allow demand response to supply non-spinning reserves.[12]

The CPUC has also approved funding for a pilot program within Southern California Edison's ("SCE") operating territory to demonstrate the ability of demand response to supply spinning reserves.[13] The pilot program utilizes SCE's extensive

[11] NOPR at ¶ 55, 56.
[12] NERC and ERCOT allow demand response to supply many of these AS products.
[13] "Demand Response Spinning Reserve Demonstration" conducted by Lawrence Berkeley National Laboratory, available at http://certs.lbl.gov/pdf/62761.pdf.

network of direct load control air conditioning cycling units (AC cycling), testing its ability to provide a spinning reserve product. Preliminary results show that most customers experience little to no negative impacts from air conditioning curtailments ranging from 5 to 20 minutes. Furthermore, demand response could be targeted geographically adding greater grid congestion relief than a traditional spinning reserve resource.

In June 2008, California utilities will submit demand response program proposals as part of their 2009-2011 Demand Response Program Portfolio. The utilities are required to propose programs that can supply the wholesale market with ancillary service products, and be compatible with the CAISO's Market Redesign and Technology Upgrade ("MRTU") Post Release 1 implementation. Currently, California has over 2000 MWs of pump hydro load, equipped with real-time telemetry and metering, which is capable of supplying the CAISO with significant amounts and numerous types of ancillary services. Thus, California has already taken many steps towards the goal of including demand response in the ancillary services market.

To ensure flexibility in the various organized markets, FERC should not mandate that the RTO or ISO adopt a blanket provision regarding the eligibility of demand response resources. For example, the NOPR provides that "demand response resources that are capable of meeting RTO or ISO size, telemetry, metering and bidding

requirements should be deemed eligible to supply demand response."[14] While demand response resources supply the same megawatts as generation, the manner in which they supply is wholly different. Requirements as to size, telemetry and metering will vary, and differences between different types of resources and their capabilities must be recognized if demand response is to be a viable competitive resource in the wholesale market, especially in the ancillary services market.

For example, although telemetry is necessary for resources offering ancillary services small commercial and residential retail load can be positioned to provide ancillary services, but a telemetry requirement for each participant may be overly burdensome and excessive. Not every demand response resource supplier has the money or the interest in installing real time telemetry and metering; however, many of these resources are capable of responding in near real-time if properly automated. At the aggregated level, telemetry will be needed to supply ancillary services, but a rule requiring the CAISO to adopt telemetry for all end-use resources would be a barrier to allowing those small residential and small commercial customers (those that are capable), from supplying ancillary services.

In a similar vein, the size and metering requirements for demand response providers could also impede small resource aggregation, and participation by individual resources if differences in resource type and capabilities are not carefully considered. The CPUC and the CAISO have undertaken a collaborative effort to ensure the

[14] NOPR at ¶ 56.

participation of small demand response resources, by establishing a 100kW minimum bid-in threshold, and one-hour interval metering for bid-in demand in the CAISO's hour-ahead scheduling process. The CPUC believes that residential load, when aggregated, is capable of supplying ancillary services (as suggested by the SCE area pilot program on air conditioner direct load control, referenced above). Installation of ISO/RTO compliant real-time telemetry should not be required for each individual residence, when statistical referencing is as reliably effective.

The CAISO, the CPUC, the California Energy Commission ("CEC"), the IOUs and various stakeholders have tentatively agreed upon a minimum bid-in threshold for demand in the day-ahead and day-of markets.[15] The CPUC is particularly encouraged that the CAISO has worked very hard to include residential retail load metered at one hour intervals into the hour-ahead scheduling process. The CPUC believes that these measures will allow customers on dynamic rates to impose downward pressure on wholesale prices.

The CPUC supports the proposal in the NOPR requiring the RTOs and ISOs to allow demand response providers to specify limits on the frequency and duration of their service in their bids to provide ancillary services.[16] The CPUC agrees that because demand response is a quasi-generation resource, it makes sense to view these resources as constrained generation. However, FERC's proposal should be expanded to all demand

[15] CAISO Straw Proposal Post-Release 1 MRTU Functionality for Demand Response (November 9, 2007) available at http://www.caiso.com/1c91/1c919e0e11c30.pdf
[16] NOPR at ¶ 62.

response resource bids in all aspects of the wholesale market. Each demand response resource should be able to submit, as part of its bid and master file, its output constraints. The CPUC, the CEC, IOUs and other stakeholders in California have tentatively agreed on a CAISO proposal that within their markets, demand response resources may submit augmented bid information, information that can also be submitted as part of the resources master file. The CAISO has proposed to allow demand response resources to submit accompanying bid information on the following:

- minimum load reduction,
- minimum load
- load reduction initiation time
- minimum load reduction time
- maximum load reduction time
- minimum base load time
- maximum number of daily load curtailments
- minimum and maximum daily energy limits
- load pick up rate
- load drop rate
- load reduction initiation cost
- minimum load reduction cost[17]

These information points are important factors to be considered by ISO operators for any bid in any market by a demand response resource. The CPUC therefore recommends that FERC consider requiring such bid in information be part of the master file of any demand response resource regardless of its capability to supply ancillary services.

[17] CAISO Straw Proposal Post-Release 1 MRTU Functionality for Demand Response, November 9, 2007, available at http://www.caiso.com/1c91/1c919e0e11c30.pdf

In conclusion, the CPUC and CAISO have already implemented many measures that support FERC's goals for demand response. However, many of these measures are unique to California's market. The CPUC therefore supports the NOPR's proposal, which would allow an RTO or ISO to adopt reasonable standards as to metering, telemetry or size requirements for demand response resources to participate in the ancillary services market, day-head markets or day-of market. The CPUC is pleased that the NOPR allows states to adopt the specific measures needed, in furtherance of FERC's goals, as best suit their particular needs.

### 2. Deviation charge

The CPUC supports the proposal in the NOPR to eliminate deviation charges to buyers in the energy market for taking less electricity in real-time market period for which the RTO or ISO declares on operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.[18] Currently, the CAISO does not assess such deviation charges. The CPUC supports this policy, and views the deviation charge as a barrier to demand response resource participation in wholesale markets. In fact, the CPUC would go a step further, and recommends such a deviation charge be eliminated not just in emergency situations, but for all other situations when the demand side deviates from its schedule by using less energy. This could become particularly important as more states implement advance metering programs, such as those adopted by California, Illinois and Georgia.

[18] NOPR at ¶ 72.

Under California's Advanced Metering Initiative ("AMI") programs, retail ratepayers are expected to consume less energy in response to incentives by pre-programming devices (e.g. a "smart" thermostat) in their homes which provide energy or price signals. Over time, the CPUC envisions the rollout of dynamic pricing tariffs where consumers are not paid an incentive, but will simply choose to not use energy during high price periods, possibly shifting their load to another timeframe or eliminating the use altogether. The load serving entity ("LSE") will rely primarily on forecasting as the mechanism to schedule this load shift. In the early stages of these programs, it is expected that there will be a forecasting learning curve to predict just how much energy the LSE needs to procure to meet demand. Thus, LSEs may over or under-procure to meet demand, and a deviation charge would be overly-punitive in such situations.

### 3. Allowing ARCs to Bid Directly into the ISO/RTO's Organized Markets

The CPUC supports, in principle, the proposal to require RTOs and ISOs to amend their market rules as necessary to permit ARCs to bid demand response on behalf of retail customers directly into the RTO's and ISO's organized markets.[19] The proposal states that RTOs or ISOs would not be required to amend their rules if the laws or regulations of the relevant electric retail regulatory authority prohibit retail customer participation in demand response. The CPUC cautions, however, consumer protection issues could arise during implementation of the proposal.

[19] NOPR at ¶ 80.

In California, the size of the market is significant, and any fundamental change in how it operates must be considered thoroughly. The CPUC currently allows third party aggregators to work through the IOUs to provide aggregation services for retail customers. Demand response aggregators in California cannot, however, directly bid their demand response megawatts into the wholesale energy markets under current California rules.[20]

While the CPUC understands the benefits of allowing demand response resources to sell their negawatts directly to the wholesale energy markets, and believes this is a worthwhile goal to work toward, it has serious concerns about the impacts on retail customers from mandating such a proposal before the states are ready. Currently, the CPUC is able to oversee the business practices of third party aggregators through their contractual relationship with California's IOUs. However, if the demand response market is opened up to ARCs without an appropriate regulatory framework in place to oversee the business practices of these third party aggregators, retail ratepayers may not be adequately informed and protected.

Many aspects of the proposal, including accounting for the value of the customers' demand response, are complex. Retail ratepayers need to be adequately informed in a

[20] The CPUC has a policy that each meter may only be served by one scheduling coordinator; the CAISO has a similar rule in their tariff which effectively prohibits ARCs in California from directly bidding demand response negawatts into the wholesale markets. *See* CPUC's Decision (D.) 97-10-087, dated October 30, 1997, in Rulemaking No. 94-04-031, *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation; Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*; CAISO Tariff section 4.5.1.1.

clear and straightforward manner. For example, customers will be solicited by an unknown entity to contract for services that the customer may not fully understand. The customers also may not understand the value of the service the customer is providing. Third party aggregators, like any business entity, operate on a for-profit platform. Anecdotal evidence to date suggests that California's small commercial and retail ratepayers curtail load not because of monetary gain, but out of a perception of the greater social benefits. While this is a welcome perspective, the CPUC is also concerned that customers are educated about the monetary value of the service they are providing, and that they are paid what it is worth.

Furthermore, customer protection and other implementation problems have been reported in the eastern demand response programs administered by the ISOs and RTOs.[21] For many of the same consumer protection reasons that Congress first established regulation over the sale of electric power to consumers, FERC should allow the states sufficient time to put into place appropriate structures to ensure protection of consumers in the demand response marketplace.

Lastly, if FERC's proposal to open the wholesale markets to direct bids from ARCs is mandatory, it could conflict with other state policy goals. For example, in California, such a requirement could interfere with California's ability to meet its state-mandated greenhouse gas goals. It is important that California and other states retain adequate authority over the administration of demand response programs, and in

particular, over how ARCs operate within the state, in order to protect their retail customers.

### 4. Market Rules Governing Price Formation During Reserve Shortages (Scarcity Pricing)

The CPUC cautiously supports the proposal to modify current market rules which limit the market-clearing price during an emergency, when the amount of available supply falls short of demand plus the operating reserve requirement (aka "scarcity pricing").[22] A well-designed scarcity pricing mechanism is conceptually compatible with incenting demand response. However, the details of implementation should be agreed upon by the states and their ISO or RTO. The CPUC supports FERC's proposal that would require RTOs/ISOs to study scarcity pricing market reforms, and report back to the Commission.[23]

How the scarcity price is set, at what level that price is set and under what circumstances scarcity pricing is triggered should be the done through collaborative efforts between the state commissions and their ISO or RTO. Scarcity pricing can be very important in markets with low price caps and/or significant reserve margins. However, FERC must keep in mind that a majority of state demand response megawatts are committed to emergency demand response programs that may not have the option of being called before an emergency. Requiring emergency demand response program

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[21] As reported in *Megawatts Daily,* Thursday, January 21st, 2008 and March 24th, 2008.
[22] NOPR at ¶ 97.

participants to migrate to more price responsive programs may result in participant drop out rates, which in turn would hurt demand response programs.

### 5. Potential Future Demand Response Reforms

The CPUC provides the following comments on proposed reforms for demand response discussed in the NOPR, and appreciates FERC's willingness to hold a technical conference on this issue.[24] The CPUC suggests improvements in two areas: (1) evaluation of cost-effectiveness and load impacts of demand response; and (2) encouraging more effective load shifting practices and enabling technologies.

A significant barrier to demand response is being able to evaluate its cost-effectiveness and load impacts. The CPUC is currently working with stakeholders to develop cost-effectiveness and load impact protocols for demand response in an attempt to quantitatively measure the effectiveness and benefits of this unique resource.[25] On March 25, 2008, the CPUC released a proposed decision that proposes to adopt draft load impact protocols for demand response resources.[26] Load impact estimates are necessary for any analysis of the cost effectiveness of demand response programs, and for other state commission activities such as long-term resource planning and resource adequacy. The CPUC's proposed demand response load impact estimation protocols provide

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[23] NOPR at ¶ 109.
[24] NOPR ¶¶ 94-96.
[25] CPUC Order Instituting Rulemaking (R.) 07-01-041.
[26] Available at http://www.cpuc.ca.gov/EFILE/PD/80528.htm

guidelines to be used to estimate the impact on load, generally in megawatts, from demand response activities.

The CPUC also recommends improvements to encourage greater load shifting practices and technologies. The CPUC has expanded the definition of demand response to include permanent load shifting practices. A tariff could also be structured to allow demand response programs to work with intermittent renewable generation resources. As pointed out earlier, California's IOUs are required to propose pilot programs that will use demand response to help integrate intermittent renewable generation, as part of their 2009 – 2011 Demand Response Program Portfolio. This is a particular concern in California, where renewable portfolio standard calls for 20% by 2010 and 33% by 2015.[27]

Another key barrier to widespread permanent load shifting is the lack of a dynamic rate structure that incent ratepayers to use (or purchase) enabling technologies for shifting load from peak times to off-peak times. Another critical concern for demand response providers is how their contributions and curtailments are measured for settlement purposes. The CPUC and other states are currently working to resolve demand response baseline issues. A properly structured baseline is vitally important to measurement of the amount of curtailment and its load impacts. The CPUC will assess baselines for settlement and measurement in the summer of 2008 as part of its demand response program application process. While numerous third parties have conducted

[27] See, *Administrative Law Judge's Ruling Providing Guidance on Content and Format of 2009-2011Demand Response Activity Applications*, filed February 25, 2008 in CPUC Docket No. R.07-01-041.

research on baseline structures, the CPUC suggests that if FERC wants to further open the wholesale markets to demand response, standardized criteria should be developed.[28]

The cost of enabling technology as well as the cost of an ISO/RTO compliant enabling technology are also a considerable barrier to reaching demand response megawatts available from the aggregation of small (under 200 kW) resources. As mentioned earlier in our comments, small aggregated resources are capable of supplying various demand response products and services. However, meter prices, telemetry prices and automating equipment prices currently make participation in ISO/RTO demand response markets financially infeasible for many potential small loads. Whether done by legislation or purely market demand, the cost of these enabling technologies must be lessened to reach the fullest demand response potential. The ISOs and RTOs can help mitigate the cost of enabling technology by creating telemetry and metering requirements for demand response that are not as onerous as those for generation.

Perhaps the single greatest barrier to demand response is the slow adoption of dynamic rates for retail rate payers. While Illinois and Georgia have some customers that have voluntarily opted into dynamic rates, many states have yet to consider implementation. California is currently developing dynamic pricing principles for PG&E to implement as part of its general rate case.[29] SDG&E will be implementing a default Critical Peak Pricing Program (CPP) for commercial and industrial customers this

[28] For example, the Department of Energy could conduct such a study to help establish baseline protocols.
[29] See, PG&E Application for rate increase, CPUC Docket No. A.06-03-005.

summer. SCE recently filed their general rate case and has proposed some new dynamic rates.[30] The CPUC continues to evaluate proposals for implementation of dynamic pricing for retail customers.

In conclusion, the CPUC recommends that the FERC encourage states to develop cost-effectiveness and load impact protocols for demand response, and encourage further research on baseline structures, improvements to enabling technologies, and study proposals for adopting dynamic rates for retail customers.

## III. LONG-TERM POWER CONTRACTING

### A. THE CPUC OPPOSES FEDERAL INTERVENTION IN CALIFORNIA'S LONG-TERM CONTRACTING PROCESSES

The CPUC agrees with the FERC's acknowledgement of the benefits of long-term contracting. Long-term contracting encourages the development of new generation by providing a predictable revenue stream that is generally needed to secure financing for the construction of new generation facilities. Long-term contracts also limit the immediate impact of volatile spot markets by insulating a substantial share of the market from short term price fluctuations. Lastly, long-term contracts may decrease the incentives for market manipulation because the share of the market subject to manipulation in spot markets is reduced by the exclusion of the share of energy supply secured by long-term contracts.

The CPUC, however, does not believe that federal intervention is appropriate or required to promote long-term contracting in California. The CPUC has adopted a strong

[30] See, SCE Application for rate increase, CPUC Docket No. A.07-11-011.

set of procedures and policies promoting long-term contracting, and is in the process of developing others. Procurement and resource adequacy are vital areas of state concern for California as the CPUC implements its aggressive renewable resource goals. It appears unnecessary and premature for the federal government to promulgate rules for the procurement market at this time. Thus, the CPUC does not support FERC's proposal to require the CAISO to establish a dedicated space on its website to facilitate trading in long-term contracts.

### 1. A Federal Mandate to Establish a Dedicated Space on CAISO's Website for Long-Term Contract Offers is Unnecessary.

FERC proposes requiring ISOs to establish a dedicated space on their websites where market participants can post offers to buy or sell long-term contracts.[31] The CPUC believes this to be unnecessary, at least within California. While a dedicated space on ISO websites to post offers to exchange long-term contracts may be a functional instrument, a federal directive for the CAISO to establish a dedicated website space to facilitate trading in long-term contracts is unnecessary given the substantial processes and policies already supporting long-term contracting in California. Additionally, the CPUC is currently considering whether to promote the development of a bulletin board, centralized capacity market, or similar platform as part of Phase Two of the Resource

[31] NOPR at ¶ 129.

Adequacy proceeding, discussed below. Further, energy contracts are already bought and sold on the Intercontinental Exchange.[32]

For the above reasons, it is unclear whether any benefit would accrue to California markets or ratepayers if CAISO were required by FERC to also post opportunities to buy and sell energy. The CPUC recognizes that not all markets are analogous to California and different measures may be appropriate in other markets that are not appropriate for California. For this reason, the CPUC takes no position on the propriety of an ISO-based dedicated website space for trading energy contracts in other regions, nor do we object to FERC *authorizing* rather than *requiring* ISOs to establish a dedicated space on their websites where market participants can post offers to buy or sell long-term contracts.

### 2. The CPUC is Presently Addressing Long-Term Contracting Within its Procurement Proceedings.

The FERC proposes in this rulemaking to create a requirement that ISOs establish a dedicated space on their websites to post offers to buy and sell long-term energy supply contracts. While we do not object to the bulletin board concept, the CPUC does not see a need for such a requirement. The CPUC actively supervises the vast majority of long-term energy supply contracts between generators and LSEs in California under the auspices of its authority over retail energy rates as well as long-term energy supply reliability.[33] The CPUC has a variety of long-term contracting programs in place,

[32] See, https://www.theice.com/power.jhtml

[33] See, CA Public Utilities Code section 380, which reads in part, "The [CPUC] shall . . . establish resource adequacy requirements for all load-serving entities. ¶ . . . ¶ (c) Each Load-serving entity shall maintain physical generating capacity adequate to meet its load requirements, including, but not limited to , peak demand and

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including aspects of the Long-Term Procurement Proceeding ("LTPP") and Resource Adequacy ("RA") proceedings.

California has a state policy, implemented by the CPUC, which favors long-term bilateral contracting through its RA program. The RA program imposes a year-ahead procurement obligation for all CPUC jurisdictional LSEs to procure capacity needed to meet their forecasted peak load, plus a fifteen to seventeen percent planning reserve margin.[34] The CPUC RA program mandates capacity payments to generation suppliers, which spur the development of new infrastructure and generation. The RA program also assures robust energy markets by establishing a contractual obligation to offer to CAISO for dispatch.[35] The CPUC understands that many CPUC jurisdictional entities' RA contracts with generators include a tolling agreement, in which the LSE essentially acts as the operator of the generator. The CPUC is currently considering developments in its RA program to expand towards a multi-year RA commitment.[36]

In addition, the CPUC requires LSEs under its jurisdiction to obtain CPUC approval of their plans to procure energy necessary for both the utilities' bundled

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planning and operating reserves. The generating capacity shall be deliverable to locations and at times as may be necessary to provide reliable electric service." See also, CA Public Utilities Code Section 454.5.

[34] See e.g., CPUC Decision D.05-10-042 *Opinion on Resource Adequacy Requirements*, in CPUC Docket No. R.04-04-003, dated October 27, 2005 p. 2.

[35] See e.g., CPUC Decision D.05-10-042 *Opinion on Resource Adequacy Requirements*, in CPUC Docket No. R.04-04-003, dated October 27, 2005 p. 2.

[36] See, *Assigned Commissioner's Ruling And Scoping Memo For Phase 2*, filed in CPUC Docket No. R.05-12-013 on December 22, 2007 at p. 17.

customers and system needs several years ahead of time.[37] This process requires LSEs to identify longer-term needs and to fulfill these needs through a request for offer process that may include both long and short-term contracts as well as decisions to buy and/or build resources. The CPUC reviews and approves IOU procurement plans, establishes policies and cost-recovery mechanisms for energy procurement, ensures that the utilities maintain an adequate reserve requirement, implements a long-term resource planning process, and implements an renewable portfolio standard ("RPS") program.[38] Because aggressive RPS requirements may require long-term contracting with new and upcoming renewable resources, the CPUC must balance the benefits of long-term contracts with existing generation resources against the need to support investment in new resources.[39] The CPUC understands that other states with RPS requirements are also balancing the various interests implicated in such a transition. State jurisdiction over long-term contracting therefore facilitates smooth and fair transitions in long-term contracting necessitated by state-based renewable resource requirements.

The CPUC's policies support long-term contracting and procurement planning to promote timely development of new generation resources, help stabilize the market and hedge risk, and favors limited reliance on the spot market, where, as FERC has

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[37] See e.g., D.07-12-052, *Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans,* in CPUC Docket No. R.06-02-013, dated December 20, 2007, at pp. 8 and 17.
[38] See e.g., D.07-12-052 *Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans,* in CPUC Docket No. R.06-02-013, dated December 20, 2007 at p. 13.
[39] *Ibid.*

recognized, prices can be volatile.[40] Therefore, there is no reason for FERC to intervene in California's markets to facilitate long-term contracting, as the CPUC is already addressing such concerns in coordination with the CPUC's general regulation and oversight of California's long-term procurement activities.

### 3. FERC's Basis of Authority for Intervening in Long-Term Contracting Is Unclear.

The CPUC questions the legal basis for FERC intervention in the long-term contracting activities of state jurisdictional LSEs. FERC does not explain in the NOPR its statutory authority for its proposed involvement in long-term energy supply contracts between generators and LSEs. Section 215(i)(2) of the Federal Power Act expressly provides that the Act "does not authorize . . . the Commission . . . to set and enforce compliance with standards for adequacy or safety of electric facilities or services."[41] Title XII of the Energy Policy Act of 2005 ("EPAct 2005"), which facilitates the creation of electricity reliability organizations to promote the reliability of the bulk power system, expressly retains state authority to assure the reliability of the energy supply within their jurisdictions.[42] California has chosen the CPUC as the appropriate entity to oversee the long-term energy supplies for the state.[43] The CAISO has recognized the need for it to defer to the "authority of State and local authorities regarding long-term planning

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[40] See e.g., *Order Instituting Rulemaking to Integrate Procurement Policies and Consider Long-Term Procurement Plans*, in CPUC Docket No. R.06-02-013, and related Decision, D.06-07-029, dated July 20, 2006.

[41] 16 U.S.C. § 824o(i)(2) (2006).

[42] Aug. 8, 2005, P.L. 109-58, Title XII, Subtitle A, § 1211(a), 119 Stat. 941 [Energy Policy Act of 2005] codified at 16 U.S.C.S § 824o(i).

reserves (i.e., resource adequacy determinations)"[44] while it pursues its own proper goal of ensuring short-term grid reliability.[45] As the courts have recognized, FERC may not do indirectly what it is prohibited from doing directly.[46]

The CPUC is concerned that FERC's proposed requirement that ISOs organize an electronic bulletin board to facilitate long-term energy supply contracts may inadvertently interfere with California's procurement activities described above. California has chosen to coordinate and balance proposed enhancements to the state's long-term energy supply and the price to be paid for such enhancements[47] against various environmentally oriented policies, as discussed above. Careful coordination of such procurement activities is necessary to avoid unintended negative impacts to market participants. The CPUC thus seeks FERC assurance that it does not intend to exercise its jurisdiction over the wholesale energy market as a method to indirectly modify California's well-

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[43] CA Public Utilities Code § 380 (2006).

[44] *Motion For Leave To File Answer Out Of Time And Answer Motions To Intervene, Comments And Protests Of The California Independent System Operator Corporation* filed in FERC Docket No. ER06-723 at pp. 4, 21 ("[T]he CAISO agrees that State regulators and the LRAs have primary responsibility for resource adequacy.").

[45] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities* FERC Docket No. R.95-8-000 at p. 282.

[46] *Northern States Power Co., et al. v. FERC, et al*., 176 F. 3d 1090 (8th Cir., 1999) at 1096, ("We think it obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an attempt to regulate curtailment of electrical power to NSP's native/retail consumers. Despite FERC's denial as to nonjurisdictional regulation, we find it has transgressed its Congressional authority which limits its jurisdiction to interstate transactions. As such, its attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC.").

[47] *Opinion on Resource Adequacy Requirements*, Decision (D.) 05-10-042, filed on October 27, 2005, CPUC Docket No. Rulemaking (R.) 04-04-003 at p. 8 ("Thus, the concept embodied in the phrase 'reliability at any cost' is not a policy option.").

developed processes designed to assure the reliability of California's long-term energy supply.

## IV. MARKET MONITORING POLICIES

The CPUC supports the Commission's efforts to determine how best to ensure that the RTO or ISO market monitoring units ("MMUs") are independent and have the authority, the resources, and the access to data needed to monitor the markets effectively. Effective market monitoring is essential to ensuring that wholesale electricity markets are competitive and functioning well, and to determining whether the prices set in these markets are, in fact, just and reasonable.[48] Thus, the CPUC generally supports the proposals in the NOPR intended to protect the MMUs' independence, to re-examine the definition of the MMUs' core duties, and to ensure that the MMUs have the necessary access to data and resources.

The CPUC opposes the proposal to remove the MMU from all mitigation functions, however. As for removing the MMU from "other tariff administration," the CPUC requests clarification of what tariff administration functions the Commission has in mind.

The CPUC supports the NOPR's proposal to refrain from adopting a "one size fits all" approach to improving the independence of the MMUs. As stated in the CPUC's

[48] See *Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), cert. denied sub. nom *Coral Power LLC v. Brown*, 127 S. Ct. 2972 (2007). (Market-based rates are not illegal per se, but FERC must monitor the market and determine whether "market forces are truly determining the price," which is required to determine whether the price is "just and reasonable"; but "if the ability to monitor the market, or gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether," and this is an abdication of

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comments on the ANOPR, the CPUC believes the "hybrid" MMU structure in the CAISO is functioning well and sees no reason to alter it at this time. Having both an internal and an external MMU with somewhat different functions provides checks and balances that supports both independence and high quality market monitoring. The CPUC appreciates the Commission's recognition of the relative strengths of this type of MMU structure.

The CPUC generally supports those proposals in the NOPR that improve access to MMU data. However, the CPUC has grave concerns that the proposals regarding state access to data would unnecessarily and unjustifiably, and possibly unlawfully, restrict state commissions' access to data needed to fulfill their regulatory responsibilities. Stated simply, state commissions should have access to the same market data (for the applicable region) that the MMUs and the Commission obtain for purposes of market monitoring, to evaluate the MMUs' conclusions and recommendations, and to undertake their own analysis.

## A. INDEPENDENCE AND FUNCTION

### 1. Introduction

As the Commission has recognized, the MMU must be independent of the RTO AND ISO. At the same time, it must be accountable. The Commission, the state commissions, and interested observers must be able to evaluate the MMUs' work. There

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FERC's responsibility under the Federal Power Act.)

is a certain tension between independence and accountability. In the comments that follow, the CPUC has attempted strike the appropriate balance.

### 2. Structure and Tools

The CPUC agrees with the NOPR that "one size fits all" is not a useful or appropriate approach, and that independence can be accomplished through various approaches. For example, at the CAISO, the internal MMU at CAISO "reports to and is accountable to" CAISO management,[49] while the external market monitor, the Market Surveillance Committee ("MSC") does not. The MSC "reports to" the board (although, according to the CAISO tariff, is not "accountable to the board") and may issue opinions and recommendations, which are public, whether or not they are requested by the Board.[50] It may also communicate any concerns it has to the Commission directly. The internal MMU may freely consult with the MSC and communicate to it all findings or concerns. The CPUC believes this arrangement provides an effective check against CAISO management or market participants pressuring the internal MMU.

In the NOPR, the Commission proposes that "each RTO or ISO include in its tariff a provision imposing upon itself the obligation to provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions."[51] The CPUC supports this proposal.

[49] CAISO Tariff, at Appendix P.1.3.1.
[50] CAISO Tariff, at Appendix P2.2.6.3.1.
[51] NOPR at ¶ 180.

The NOPR proposes not to require tariff language requiring the MMU to report instances in which the ISO is not providing sufficient access to data or resources.[52] The CPUC disagrees with this point and believes that there should be tariff language to this effect. The NOPR states that "[t]he inclusion of such a requirement may suggest that the Commission anticipates non-compliance on the part of the RTOs and ISOs."[53] The CPUC respectfully suggests that this rationale is unpersuasive. Reporting requirements generally imply that compliance cannot be taken for granted. More importantly, the Commission cannot address a problem it does not know about. Because it is imperative that the Commission take action if a MMU is prevented from performing its duties effectively, the CPUC supports tariff language that would permit the MMU to inform the Commission when it is unable to obtain access to data or resources and can demonstrate that its ability to perform core duties is materially impaired.

### 3. Oversight

In the NOPR, the Commission proposes that in an RTO or ISO with a single MMU, it report to the RTO or ISO on market oversight matters, board rather than to management. In an RTO or ISO with a "hybrid structure, like California, the Commission proposes to allow the internal MMU to report to RTO/ISO management while the external MMU reports to the board. As noted above, the CPUC believes that the current CAISO structure is working well, and sees no reason to change it.

[52] NOPR at ¶ 182.
[53] *Id*.

In the NOPR, the Commission declined to propose a formal auditing procedure for MMUs or a blanket requirement that all changes in MMU status must be reviewed by FERC.[54] The CPUC believes that significant changes should be subject to Commission review. For example, the Commission should review changes to the structure of the MMU (e.g., change from external to an internal MMU) or the dismissal of key MMU personnel (e.g. director of the MMU).

### 4. Function

The NOPR identifies three core functions for an MMU: (1) identifying ineffective market rules and tariff provisions and recommending proposed rule and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets; and (3) identifying and notifying the Commission staff of instances in which a market participant's behavior may require investigation. The CPUC agrees that these functions are core duties of the MMU and offers comments on each of them below.

#### a. Identifying Ineffective Market Rules and Tariff Provisions and Recommending Proposed Rule and Tariff Changes

The CPUC agrees that the MMU participation in tariff formation should be limited to an advisory role, but emphasizes that this role is extremely important. The CPUC also agrees that the MMU's role is to monitor the market and to recommend rule changes; for the market monitor to also be actively involved in tariff formation would invite a conflict

[54] NOPR at ¶ 189.

of interest. Therefore, CPUC supports the "caveat that the MMU is not to effectuate its proposed market design itself."[55]

The CPUC conditionally supports the second caveat proposed by the Commission, that the MMU should "limit distribution of its identifications and recommendations to the RTO or ISO and to Commission staff in the event it believes broader dissemination could lead to exploitation…"[56] The CPUC would support this caveat provided the Commission requires the MMU to provide this information to state commissions and local regulatory authorities, on a confidential basis, so that they are also aware of these "loopholes." It is critical for state commissions to be aware of these loopholes so that state commission staff can accurately assess whether the prices created in the wholesale markets, and then passed on to rate payers, are, in fact, just and reasonable. Armed with the information, state commissions may be able to take steps to protect ratepayers separate and apart from any decisions about whether enforcement action is warranted.

### b. Reviewing and Reporting on the Performance of the Wholesale Markets

Few state commissions have the resources to independently analyze the vast amounts of data on the wholesale markets. In light of this reality, the CPUC believes it is reasonable to require the MMUs to provide analyses and reports to state commissions.[57] MMU tariffs should be revised as needed to clarify that the MMU will conduct analyses

[55] NOPR at ¶ 198. The CPUC understands the term "effectuate" to mean actively design, submit, and implement rules and/or tariff changes to the Commission.
[56] *Id*.

and provide studies/reports when reasonably requested by a state commission. Furthermore, state commissions should also have access to any data that the Commission receives regarding market operation and efficiency provided the state commissions are able to demonstrate the ability to maintain the confidentiality of sensitive data.[58] As demonstrated in the CPUC's response to the ANOPR, the CPUC has the ability to keep confidential any commercially sensitive or privileged information contained in such reports.[59]

This recommendation is no way inconsistent with requiring MMUs to make data on the wholesale markets available to states that want to conduct their own analyses. This point is addressed in section the "Tailored Request for Information Section" below.

### c. Identifying and Notifying Commission Staff of Instances in Which a Market Participant's Behavior May Require Investigation

The CPUC agrees that one of the MMU's core duties is identifying and notifying the Commission's Office of Enforcement staff of instances in which a market participant's behavior, or that of the RTO or ISO, may require investigation, including suspected rule or tariff violations, market manipulation, inappropriate dispatch, and suspected violations of Commission-approved rules and regulations as proposed in the NOPR. With respect to violations by the RTO, it is reasonable to limit these referrals to

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[57] See, NRRI, "Transparency, Cooperation and Innovation: Electricity Market Monitoring Issues for State Regulators" (2004), pp. 31-33.

[58] This data includes the data that underlies aggregated data used by the MMU in all reports.

violations that come to the MMU's attention in the normal course of business. In other words, it would be counter-productive to charge the MMU specifically with the responsibility for monitoring the RTO for tariff violations. The CPUC believes that state commissions should also be notified of these referrals as the actions in question likely have a direct impact on whether wholesale prices, which are passed on to retail customers, are just and reasonable.

### 5. Mitigation and Operations

The Commission proposes to remove the MMU from "tariff administration, including mitigation."[60] The CPUC reiterates the request it made in comments on the ANOPR for clarification of what "tariff administration" functions the Commission proposes to remove from the MMU beyond mitigation.[61]

The CPUC believes that the MMU should not be removed from mitigation, as the Commission proposes. The CPUC believes that any conflict of interest involved in mitigation is greater for the RTO or ISO than for the MMU, particularly if the MMU is acting in a reporting/advising role.

In the NOPR the Commission states:

> [M]itigation is supposed to be nondiscretionary in nature. RTOs and ISOs, as well as MMUs, are required to limit the administration of tariff compliance to those provisions expressly set forth in the tariff, involve objectively

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[59] For further discussion of this point, see the section of these comments on Information Sharing.
[60] NOPR at ¶ 210.
[61] ANOPR Response at ¶ 24.

> identifiable behavior, and do not subject the seller to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.[62]

To the extent that mitigation is non-discretionary, the impact on market outcomes created by the MMU performing these duties and the RTO/ISO performing these duties should be identical. For example, the CAISO's internal MMU is currently involved in mitigation in a number of ways. It would not necessarily pose a problem to transfer the purely ministerial aspect of mitigation to ISO Operations – that is, the function of administering mitigation measures that have been vetted and approved and essentially automated. Thus, the MMU has no direct impact on "market outcomes that the MMU itself has influenced."[63]

If all mitigation was non-discretionary, then there would be no conflict of interest for either the MMU or RTO/ISO. However, the Commission's concern about a conflict of interest for the MMU implies that some mitigation activities involve some discretion. In instances of discretionary mitigation, there are at least two reasons why the RTO or ISO is subject to greater conflict than the MMU. First, the RTO/ISOs created and approved the rules and tariff. Second, the relationship between RTO/ISO staff and market participants breeds familiarity.[64] Though the Commission acknowledges these potential conflicts, it does not explain why they do not merit any further discussion.

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[62] NOPR at ¶ 209.
[63] NOPR at ¶ 200.
[64] NOPR at ¶ 204. Other reasons for keeping the mitigation function with the MMU are offered, but the CPUC believe these are the two most legitimate concerns.

However, Commission Kelly, in her opinion concurring in part and dissenting in part, argues that these potential conflicts are significant and warrant further discussion.[65] The CPUC agrees.

Involvement in the formation and creation of the rules creates a greater conflict of interest for the RTO or ISO than the potential impact on the market of an independent entity, such as the MMU, who analyzes and reports on market outcomes. The RTO/ISO has developed rules and tariffs to determine the operation of the market. The creation and submission of these market rules to the Commission shows that the RTO/ISO staff and management believe that the rules and tariff are well designed and effective. The RTO or ISO has a vested interest in avoiding mitigation that may reveal that these rules are not effective. As recognized by the Commission in this NOPR, a core function of the MMU is to provide *advice* in the rules and tariff creation. If the MMU is acting only in an advisory role, then it is not subject to this conflict of interest to the same degree.

The conflict of the RTO market operators is exacerbated by the personal relationships that develop between RTO/ISO staff and market participants, as mentioned in the comments of Portland Cement Association[66] and noted also by FERC Commissioner Kelly.[67]

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[65] Commissioner Kelly states "I agree…that having RTO/ISO staff mitigate creates a much greater conflict of interest than any incidental conflict created by having the internal MMU both mitigate and report on the functioning of the markets." NOPR, concurring/Dissenting Opinion of Commissioner Kelly at p. 2.
[66] Comments on the Advanced Notice of Proposed Rulemaking Submitted by Portland Cement Association (PCA) at p.19.
[67] NOPR, Concurring/Dissenting Opinion of Commissioner Kelly, at p.2.

The CPUC believes that market outcomes of non-discretionary mitigation duties are the same whether applied by the MMU or the RTO/ISO. Furthermore, for the reasons stated above, the possible conflicts are greater for the RTO/ISO than for the MMU when conducting discretionary aspects of market monitoring. Lastly, as noted in the NOPR, several RTO/ISOs oppose removing the MMU from mitigation. There appear to be several good reasons to continue to allow the MMU to participate in mitigation.[68] The MMU should not be forced to relinquish all mitigation activities.

Although the CPUC is opposed to removing the MMU from mitigation responsibilities, in the event the Commission decides to proceed with this change, the CPUC offers these comments on how to transition the mitigation responsibilities to the RTO or ISO, as requested by Commission.[69] The CPUC believes it is important for this transition not to have a predefined timeframe placed on it. Instead, the CPUC suggest that the transition be finalized when the MMU certifies that the new RTO/ISO staff has an adequate number of personnel with sufficient training and expertise in mitigation. There must be a transition period that can only be terminated and the final transfer of authority made subject to MMU and FERC sign-off. After the MMU has signed off on the transfer, it seems advisable to allow the MMU to continue to provide redundancy in determining instances in which mitigation is required for at least six more months. Though the MMU would not administer the mitigation, they would be able to provide

[68] NOPR at ¶ 206.
[69] NOPR at ¶ 210.

independent verification that the mitigation measures were performed correctly and without conflicts of interest. Lastly, in order to continue to be able to assess the performance market rules, the MMU *must* be made aware of *all* mitigation measures taken by the RTO or ISO. This information is necessary to enable the MMU to determine if/how the rules and/or mitigation are impacting market outcomes.

#### 6. Ethics

The CPUC supports the Commission's proposal to develop a standardized MMU Code of Ethics that would impose certain minimum ethics standards on all MMUs. The specific language and content of these standards should be left to individual RTO/ISOs and market participant to decide. The CPUC continues to support the minimum standards proposed in the CPUC's response to the ANOPR.[70]

#### 7. Tariff Provisions

The CPUC supports the Commission's proposal to require that RTO and ISOs consolidate all provisions regarding the MMU in one section of their tariff[71] as this would make the information regarding MMUs more accessible to all.

### B. INFORMATION SHARING

#### 1. Introduction

The CPUC commends the Commission for recognizing, first, that it is important that both the public and state commissions have access to market data and analyses by the MMUs, and second, that it is necessary to address separately what information should be

[70] ANOPR Response at ¶ 24-25.

made public, and what non-public information should be provided to state commissions. The CPUC generally supports those proposals in the NOPR that improve both types of access. However, the CPUC has grave concerns that the proposals regarding state access to data would unnecessarily and unjustifiably, and possibly unlawfully, restrict state commissions' access to data needed to fulfill their regulatory responsibilities. Stated simply, state commissions should have access to the same market data (for the applicable region) that the MMUs and the Commission obtain for purposes of market monitoring. State commissions need this information to evaluate the MMUs' conclusions and recommendations, and to undertake their own analysis. With this information, state commissions will be better informed about the functioning of the markets, and public confidence that the markets are being effectively monitored will improve.

In the CPUC's view, it is inappropriate and potentially unlawful for the Commission to position itself as gatekeeper of MMU information sought by state commissions, as proposed in the section of the NOPR entitled "Tailored requests for information."[72] The "gatekeeper" proposal would leave entirely to the Commission's discretion what information to withhold from state commissions, and could, if implemented, actually restrict the CPUC's access to information compared to the status quo. On both practical and legal grounds, the CPUC opposes the "Commission as

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[71] NOPR at ¶ 217.
[72] NOPR at ¶ 231, et seq.

gatekeeper" aspect of this proposal. The CPUC will explain the reasons for its position in this section of its comments.

### 2. Enhanced Information Dissemination

This section of the NOPR addresses *how* market data and analyses by the MMUs should be made available to the public. As to *what* information should be made available, the Commission declines to propose any "generic standard," proposing instead to determine what information should be made available on a case-by-case basis "so long as it generally consists of market analyses of the type regularly gathered by the MMUs in the course of business, and so long as it remains subject to appropriate confidentiality restrictions."[73]

The CPUC supports the Commission's proposal to require MMUs to disseminate public reports on their market analyses on a quarterly basis.[74] The CPUC also supports the proposal that the MMU hold quarterly "state of the market" conference calls open to the staff of the RTO/ISOs, state commissions, and state attorneys general.[75] The CPUC notes that the CAISO's internal MMU (the Department of Market Monitoring) currently provides market reports to the CAISO Board, which are public, usually on a monthly basis, as well as an annual report. The external MMU also issues public reports to the Board several times a year, as well as published opinions on important market design issues, which are very valuable to decision-makers, including the CPUC.

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[73] NOPR at ¶ 226.
[74] NOPR at ¶ 227.
[75] NOPR at ¶227. If aggregated data is presented, the RTO/ISO should provide an explanation of the method used

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The CPUC supports the Commission's proposal to reduce the lag period for release of offer and bid data from six months to three months (while allowing RTO/ISOs to propose a shorter period).[76]

### 3. Masking and Unmasking of Data

The Commission proposes to retain the practice of masking the identity of market participants when releasing offer and bid data.[77] The CPUC suggests releasing unmasked historic market data after sufficient time has elapsed to ensure such identification will not cause financial damage to market participants. After substantial lag time (perhaps two calendar years earlier) bid strategies become outmoded and therefore releasing the information contained in these bids presents no risk of financial harm. The CPUC suggests that the Commission consider allowing the RTO or ISO to release unmasked data after two full calendar years have lapsed to allow for more thorough analysis and independent research. For example, at the start of 2010, market data with identifying characteristics would be released for all of 2008. Additionally, at the beginning of each calendar year, the masking for each market participant would be changed to prevent market participants from being able to use old data to create a key that would allow them to immediately determine all market participants in the current data.

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for data aggregation.

[76] NOPR at ¶ 229.

[77] NOPR at ¶ 230.

For example, the codes used to mask a specific generator on December 31, 2008 would be changed on January 1, 2009.

### 4. Tailored Requests for Information

The Commission proposes that MMUs entertain "tailored requests for information" from state commissions (that is, information above and beyond the generalized, masked, and aggregated data the Commission proposes to make available to the public), subject to the following restrictions:

> "so long as such information pertains to general market trends and performance, is not designed to aid state enforcement or actions against individual companies,[fn] and the MMU can accommodate such requests within its budgetary and time constraints without jeopardizing its ability to perform its core tariff-defined functions."[78]

Whether to respond to the requests would thus be left to the discretion of the MMU. The CPUC agrees that information requests by state commissions should not overly burden the MMU, and certainly should not be so disruptive as to jeopardize the MMU's ability to perform its core market monitoring duties.

Responding to state requests for information need not be overly burdensome. In California, the CAISO and the CPUC have been able to work out the wording, scope and timing of CPUC information requests in a reasonable and cooperative manner. After informal staff-level consultation for the purpose of tailoring the CPUC's request for information as precisely and narrowly as possible, the CPUC requests or subpoenas the

[78] NOPR at ¶ 234 (footnote omitted, emphasis added).

desired information from the CAISO. Sensitive commercial information that must be protected from public disclosure is protected by a nondisclosure agreement.[79]

Furthermore, responding to some state commission requests may fall within one of the MMU's core functions (as defined in the NOPR): "to review and report on the performance of the wholesale markets."[80] This core function should be understood to include "reporting" to state commissions (in the sense of providing information on the state of the markets) as well as to the RTO/ISOs and to FERC. If the Commission adopts the principle that state commissions that are able to protect confidential information from disclosure have access to the same data and reports that the Commission can obtain, there should be relatively little need for "tailored requests" from state commissions.

The CPUC supports the suggestion that the RTO or ISO "develop confidentiality provisions in their tariffs that will protect commercially sensitive material, but which will not be so restrictive as to permit the release of little if any information."[81] Because this language is somewhat vague, the CPUC suggests a revision along the following lines: "The RTO or ISO should develop confidentiality provisions in their tariffs that will protect commercially sensitive material, but will be no more restrictive than necessary to protect that information."

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[79] The information protected in this way is exempt from disclosure under the California Public Records Act. See CA Gov't Code § 6254 (h).
[80] NOPR at ¶ 191.
[81] NOPR at ¶ 235.

### 5. Petition to FERC for Information Going Beyond General Market Information

The Commission proposes to require state commissions to petition the Commission for access to information "that does not fall within the proposed acceptable parameters."[82] Information "designed to aid state enforcement or actions against individual companies" is outside the "proposed acceptable parameters." Therefore, state commissions would have to petition the Commission for access to information deemed by the Commission to be for enforcement purposes, and these petitions would be granted only if the Commission determined that there was a "compelling need" for the information and that "adequate protections could be fashioned for commercially sensitive information."[83] The Commission characterizes this petition mechanism as a "safety valve" intended to reassure states that they will be able to get information "for which they have a compelling need."[84] But the CPUC is not at all reassured by this petition requirement; in fact, it has grave concerns about it.

The proposal on state commission access to MMU data and analyses, taken as a whole, appears only to ensure state access to "information regarding general market trends and performance." (It is unclear if this data would also be limited to aggregated data or if state commissions would also have access to raw data – see ¶231.) For the CPUC (and possibly other state commissions), it would restrict, not expand, access to data, and would add a new procedural requirement (petitioning to the FERC). It would

[82] NOPR at ¶ 237.
[83] NOPR at ¶ 231.

greatly increase the standard for states to obtain information by requiring states to (1) obtain FERC authorization and (2) show a "compelling need" for the information. This is problematic, for several reasons:

### a. The Proposed Limitations on State Access Would Cripple State Market Monitoring.

The Commission proposes to limit "tailored requests" from state commissions to deny access to market data designed to aid state enforcement or actions against individual companies. A threshold question is: how does one determine whether the state's request is for enforcement purposes? The CPUC routinely issues subpoenas and/or data requests to the CAISO (or individual market participants) in order to get a better understanding of generator behavior. These requests are usually issued through the CPUC's Consumer Protection and Safety Division ("CPSD"), as part of its charge to ensure the safety and reliability of California's electrical supply. These data requests are often deemed "preliminary inquiries" and do not proceed to full scale investigations. If the CPUC finds that a market participant's actions warrants further investigation after review of the initial information, only then does the CPUC proceed to open a formal investigation. During the initial stages, however, CPSD staff often does not know whether the matter will be put to rest after the preliminary inquiries are satisfied, or whether the behavior warrants further investigation. The proposed restriction could in effect deny state commissions' access to any information from the RTOs involving particular suppliers (or traders).

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*Footnotes continued from previous page*

[84] *Id.*

Moreover, what test would the Commission propose to distinguish between information designed to aid state enforcement actions, and information designed to allow states to monitor the market, which may or may not lead state regulatory authorities to consider enforcement action? Put simply, state commissions can play little or no role in monitoring the markets without access to information.[85] The proposed rule places undue restrictions on access to information. The CPUC strongly opposes any limitation on its right to make reasonable and not overly-burdensome requests for market information from the RTO.

**b. The Proposed Limitation is Unnecessary and Disrupts Existing State Access to Market Data.**

The CPUC and the CAISO have an established practice for sharing market information that preserves the confidentiality of the data, a concern also noted in the NOPR.[86] The CAISO recognizes that much of the market participant data in its possession is confidential. If any market participant data sought by the CPUC is deemed confidential according to the CAISO Tariff, the CAISO requires a formal request for the information, usually in the form of a CPUC subpoena, which is accompanied by an inter-agency confidentiality agreement. The CAISO then issues a "Market Notice" to the affected market participant, providing notice of the subpoena, and confidentiality

[85] As noted by NARUC and the Ohio PUC, the proposed limitation on access to information used for state enforcement purposes would prevent states from obtaining information to which they have little or no other access. (See NOPR ¶ 232.)

[86] The NOPR proposes that RTOs and ISOs develop reasonable confidentiality provisions. (¶ 235, ¶ 236.)

agreement, which allows the market participant to object or otherwise seek to protect any confidential data from disclosure that might result from a Public Records Act request (Cal. Gov't Code § 6250 et seq.).[87] This process, worked out between the CAISO and CPUC, has been in place for many years, and is effective. It provides the market participant notice and an opportunity to be heard before data is released to the CPUC, allows the CPUC the data it needs to perform its regulatory functions, and respects the confidentiality provisions in the CAISO's tariff.

### c. The Proposed Limitation on "Tailored Requests" is Contrary to State and Federal Law.

Finally, FERC's proposed rule to limit state access to data is inconsistent with existing state and federal authority that allows the CPUC broad access to review the books, accounts, papers, contracts, and other records of market participants. The CPUC has authority to issue subpoenas for the attendance of witnesses and production of papers, in any inquiry, investigation, hearing or proceeding. (CA Public Utilities Code § 311.) CPUC subpoenas are enforceable in state superior court, which is authorized to compel appearances for an order to show cause for failure to respond to the commission's

[87] The CPUC has agreed to work with the CAISO, who in turn, notifies the affected market participant within the timeframe mandated by state law, in responding to any such information requests. The CPUC may, where applicable, assert the privilege for official information acquired in confidence (CA Gov't Code § 6254(k) and Cal. Evid. Code § 1040) in response to a subpoena or Public Records Act request. The California Public Records Act exempts from disclosure:

> "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the [California] Evidence Code regarding privilege." (CA Gov't Code § 6254(k)).

subpoena, which is punishable as contempt of court. (CA Public Utilities Code § 1792, 1793.)

The CPUC has broad authority under the California Constitution, Article 12, section 2, as well as the California Public Utilities Code section 701, "to do all things necessary and convenient" in the exercise of its jurisdiction over public utilities. This authority has been liberally construed by the California courts.[88] For example, it has been held that the CPUC has limited jurisdiction to enforce conditions it imposed on holding companies of its electric utilities when it conditionally approved holding company structures for those utilities, even though the holding companies are not regulated by the CPUC.[89] Under California law, the CPUC has limited jurisdiction over the holding companies for the specific purpose of enforcing those conditions because those conditions are "cognate and germane" to the CPUC's regulatory responsibilities.[90]

The CPUC's authority to obtain information is thus not limited to electric utilities regulated by the CPUC.[91] During the western energy crisis of 2000-2001, the CPUC exercised its authority under state and federal law (16 U.S.C. § 824(g)) to investigate the books and records of exempt wholesale generators in California.[92]

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[88] *PG&E Corp. v. CPUC* (2004) 118 Cal. App. 4th 1174, 1198.
[89] *Id*. at 1200.
[90] *Id*.
[91] *Id*.
[92] See, CPUC Resolution L-293, as modified by Order Modifying Resolution L-293 and denying rehearing (Decision No. 01-06-088 (June 28, 2001) (petition for writ of review denied sub nom *Mirant Delta LLC, et al., v. CPUC* (A095743) (Cal. Court of Appeal, First App. Dist., Dec. 4, 2001)).

The Federal Power Act authorizes state commissions to examine the books, accounts and records of both electric utilities and exempt wholesale generators, as "required for the effective discharge of [its] regulatory responsibilities affecting the provision of electric service." (16 U.S.C. § 824(g)(1).) This right is subject to the limitation that state commissions "shall not publicly disclose trade secrets or sensitive commercial information." (16 U.S.C. § 824(g)(2).)[93] State commissions' rights to access this information is enforceable in the United States district court (16 U.S.C. § 824(g)(3)) and does not preempt applicable state or federal law concerning the provision of records and other information. (16 U.S.C. § 824(g)(4).)[94] It appears that the proposed restrictions on state commissions' access to MMU data could actually deny states access to information to which they are entitled under this provision of the Federal Power Act.

**6. MMU Referrals to the Commission**

The CPUC is disappointed that the Commission has rejected state commission requests to be informed when a MMU refers a matter to the Commission for investigation, and urges the Commission to reconsider this point. The MMU's referral, and, upon request, any relevant investigatory information used by the Commission, should be provided to the affected state commissions under appropriate terms of confidentiality. The CPUC also agrees with Commissioner Kelly that the Commission

[93] Thus, information protected by this subsection is also protected from disclosure under the California Public Records Act. (See CA Gov't Code § 6254 (k).)

[94] CPUC General Order 167, § 10 provides further specific authority to request information from owners of

*Footnotes continued on next page*

should provide information to MMUs about the matters they have referred to the Commission.[95] Providing this information to state commissions and MMUs, respectively, would help increase confidence that the Commission investigates attempts to manipulate the electricity markets and takes effective action if and when it occurs.

### C. PRO FORMA TARIFF

In the NOPR, the Commission, instead of proposing that RTOs or ISOs follow a pro forma MMU tariff section, that "they conform their tariff to the requirements that will be ultimately set forth in the rulemaking to be issued in this docket." Given the concerns regarding several subsections within Market Monitoring Policies portion of the NOPR, the CPUC is unable to support this proposal. Of particular concern to the CPUC are the issues surrounding the access of state commissions to data either through the MMU or the RTO/ISO.

## V. RTO AND ISO GOVERNANCE

### A. INTRODUCTION

The CPUC is sympathetic to FERC's objective to improve customer access to the board of directors of an RTO or ISO, and appreciates FERC's revision to what it proposed in the ANOPR, to achieve this goal. FERC's increased flexibility on this issue is a good step in the right direction.

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*Footnotes continued from previous page*

generating facilities located in California.

[95] NOPR, Concurring/Dissenting Opinion of Commissioner Kelly, at p.3.

However, as indicated in our previous comments, in California, customers and stakeholders have unabridged and direct access to the Board of Governors of the CAISO. The CAISO's current stakeholder process on tariff and policy development is completely transparent and allows for multiple opportunities for all willing customers and stakeholders to present their position and make recommendations. Additionally, the CAISO works closely and collaboratively with the state's regulatory agencies, who share and have complementary responsibilities in overseeing the reliability of the electricity sector.

For these reasons, the CPUC urges FERC to take no further action via rulemaking for this section of the NOPR. Indeed, it is questionable whether FERC has the legal authority to take the type of actions to reform the board of directors of an RTO or ISO that are being considered in the NOPR.

If however, FERC decides to proceed with such reform, the CPUC urges FERC to proceed only by means of an RTO/ISO-specific adjudicative process under section 206 of the FPA. In such event, however, based on the CAISO's independent board, open and transparent stakeholder process and an ongoing mutual working relationship with other state agencies, FERC need not, and should not, initiate any such RTO/ISO-specific adjudicative process for the CAISO.

As noted above, this section of the NOPR does now provide for some flexibility by allowing RTO/ISOs to file a compliance report showing that their customers and stakeholders already have open direct access to the RTO's or ISO's board of directors. If however, such mechanisms are not in place, the NOPR suggests three possible reforms:

- The creation of hybrid boards of directors composed of independent members and representatives of stakeholders;
- The creation of committees of stakeholder representatives with some form of direct access to the board of directors, distinct from the technical advisory committees that already exist in most RTO/ISOs; and
- Such other alternatives as may be proposed by an RTO or ISO.

**1. Compliance Filing**

In California, there are already sufficient mechanisms that assure effective customer and stakeholder access to the CAISO Board of Governors. Article IV of the CAISO's By-Laws provides for the creation of several committees to aid in this process: Committees of Governors, ADR Committee, Audit Committee and Advisory Committees. Article IV, Section 2 of the CAISO By-Laws solely addresses the CAISO's Advisory Committee, which will be discussed in more detail below in subsection D, below.

In addition to its Advisory Committees, the CAISO has a built-in mechanism for stakeholder access to its Board of Governors before the Board votes. Section 10 of the CAISO's By-Laws describes this process: At a minimum, four days prior to a Board meeting, a public notice is placed on the CAISO's website. Along with the notice, an inclusive and instructive agenda is also available via the CAISO's website. As stated in Section 10 of the CAISO's By-Laws, a regularly scheduled Board meeting provides an opportunity for the public to comment on issues currently considered by the Board. The

public comment period is specified on the agenda. During the public comment period, anyone that desires to speak may do so, directly to the CAISO's Board of Governors.

It should be emphasized that the meetings of the CAISO's Board of Governors are, except for a narrowly defined category of personnel and litigation-related issues, open to the public. Moreover, stakeholders are allowed to directly address the CAISO Board on the issue at hand after the CAISO Staff has presented its recommendation. Thus, on all issues presented to the CAISO's Board of Directors for decision, the CAISO's stakeholders, and not its management, have the last word.

As far as the CAISO is concerned, such openness is standard practice; however, we understand that this may not be the case for all RTO/ISOs. For this reason, FERC needs to take a flexible, case-by-case approach in addressing RTO or ISO governance issues. However, because the CAISO already complies with the intent of the NOPR, the CPUC would urge FERC not to initiate a proceeding to look into the CAISO's governance.

### 2. "Hybrid" Board of Directors

One possible reform that FERC calls for is the creation of a hybrid board of directors composed of independent members and representatives of stakeholders. This proposal is highly problematic and arguably illegal. First, a hybrid board of directors would violate FERC Order Nos. 888 and 2000, which require that an RTO/ISO's board be independent from market participants. Second, FERC does not have the legal authority to impose any reform pertaining to the makeup of the board of directors of a state-created ISO.

The CPUC has previously made these points to FERC in our comments on the ANOPR. However, these points merit restatement. FERC's suggestion of a Hybrid Board risks causing FERC to fall down a slippery slope. The legal precedent on this point is unambiguous: FERC simply does not have the legal authority to reform a state-created ISO. This principle was affirmed by the U.S. Court of Appeals for the D.C. Circuit in *CAISO v. FERC*, 372 F.3d 395 (2004), a case in which the CPUC actively participated on behalf of the CAISO. We cannot emphasize the point strongly enough: in this decision, the D.C. Circuit ruled unambiguously that *FERC has no authority to reform the selection method of the governing board of the CAISO*. However, FERC's proposed action in the NOPR appears to disregard this key, directly relevant legal precedent.

The CAISO was created by a California statute, in which the state has preserved the right to appoint the CAISO's Board of Directors. Moreover, the D.C. Circuit has already ruled that FERC has no authority to make or enforce an order prescribing the composition and process for electing the board of directors. The CPUC has brought these points to FERC's attention in our comments on the ANOPR. As such, at least insofar as it would purport to apply to the CAISO, FERC's hybrid board proposal is not viable and should be stricken from the NOPR.

In addition to the dubiousness of FERC's *legal* authority to prescribe such a measure, the establishment of hybrid boards would directly contradict FERC's own *policy*, as articulated in FERC Order No. 888 and Order No. 2000. Specifically, FERC Order No. 888 states that an RTO or ISO must be *independent of market participants* to

insure impartiality in the organization's decision-making on policy, operations, and dispute resolution.[96] Likewise, FERC Order No. 2000 identifies that the critical foundation of an RTO/ISO is independence; an RTO/ISO "needs to be independent in both reality and perception."[97]

Accordingly, FERC has previously established clear policy on this issue, which its proposal on hybrid boards in the NOPR would directly contradict. However, nowhere in the NOPR, nor in the previous ANOPR, does FERC provide a reasoned justification, or even an ostensible rationalization, for the drastic shift from its established policy that the creation of hybrid boards would effectuate.

FERC should recognize that a hybrid board would necessarily endanger the independence of an RTO/ISO's board of directors. Stakeholder representatives on a hybrid board will inevitably encounter a conflict of interest: will such a representative choose to vote for what is in the best interest of his/her employer, or will such a representative choose to vote for what is in the best interest of all of the RTO/ISO's stakeholders? The answer to this question is obvious. A hybrid board will create a situation akin to the "prisoner's dilemma" exercise, widely famous in modern economics. The "prisoner" has the choice to do what is in his personal best interest or in the best interest of the larger group. However, there is an inherent conflict of interest in such a choice.

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[96] See, FERC Order No. 888 ¶ 31,036 at 31,730-31
[97] See, FERC Order No. 2000 ¶ 31,089 at 31,061

Along similar lines, members of a hybrid board would have a high incentive to vote in their respective employers' best interest, because the goal of market participants is to maximize profits. However, most RTO/ISOs, as is the case with the CAISO, are non-profit corporations, and the boards of directors of such entities need to be independent in order to minimize the possibility for conflicts of interests between a board member's fiduciary duty to, on the one hand, the broader, regional interests of the RTO or ISO and the collectivity of its stakeholders and, on the other hand, the narrow self-interests that derive from the board member's compensated employment by one of those stakeholders.

### 3. Board Advisory Committees

The CPUC understands and appreciates FERC's objective that stakeholders of an RTO or ISO need to have opportunities for direct access to the board of directors of such entities. Customers and other stakeholders of an RTO or ISO must have some form of effective direct access to the organization's board of directors. However, in the absence of a perfect model of open access and transparent decision-making, the requirement that RTO/ISOs establish a board advisory committee is certainly to be preferred to the hybrid board approach. Commissioner Kelly has previously made statements to this effect, and the CPUC is in full agreement in this regard.

As the CPUC, Commissioner Kelly and others have pointed out, if there is a justifiable concern that customers and stakeholders of an RTO or ISO do not have adequate direct access to the organization's board of directors, the proper means to remedy this lack of access is through the creation of a board advisory committee. We again would note (as we noted in our comments on the ANOPR) that the CAISO already

has such mechanisms in place. One such mechanism is the transparent and open stakeholder process, which also allows for direct access to the Board of Directors before decisions are taken, was discussed in subsection A, above. The other mechanism, an Advisory Committee, is explicitly written in the CAISO's By-Laws.

Article IV of the CAISO By-Laws provides for the creation of several committees, including an Alternative Dispute Resolution Committee, an Audit Committee and an Advisory Committee. Article IV, Section 2 of the CAISO By-Laws, specifically addresses the Advisory Committee. An Advisory Committee may consist of both board members and non-board members. The committee members are appointed by the Governing Board with the caveat that the "composition of the committee reflects the broad range of entities representing all Classes that express interest in participating in that committee."[98]

Additionally, Article V, Section 1 of the CAISO By-Laws asserts that the State Oversight Authority may also assign advisory representatives. The Advisory Committee has no legal authority on behalf of the CAISO, but is responsible for presenting their findings and may offer recommendations directly to the Board. Thus, the representatives on the CAISO's Advisory Committee are intended to, and do in fact, characterize the interests of public agencies and any other stakeholder organization (public or private) that has an interest and wish to participate. As can be seen from these provisions of the CAISO's By-Laws, the purpose and goal of the CAISO's Advisory Committee clearly

parallel the rationale given by FERC in both the ANOPR and the NOPR for the establishment of "board advisory committees."

Because the CAISO already has such an Advisory Committee, the CAISO should easily be able to demonstrate to FERC that it already satisfies the objectives on this issue that FERC has set out in the NOPR, and there is accordingly no need for FERC to initiate a proceeding to look into whether the CAISO should establish such a Committee.

#### 4. Responsive Stakeholder Processes

As was the case in the ANOPR, there is no need for the CPUC to comment in any detail on this sub-section of the NOPR, which deals with the transparency and responsiveness of RTO/ISO management and budgeting processes. The CPUC supports FERC's adoption of these proposed standards, but notes that, in our view, the CAISO already satisfies the criteria that FERC prescribes.

### B. CONCLUSION

Direct access to the board of directors of an RTO or ISO is a critical issue in all organized markets. In California, the CAISO takes this responsibility very seriously and is already in compliance with the goals and purposes that FERC has articulated in the NOPR. Thus, for all the reasons noted above, the CPUC believes that it would be unnecessary, indeed, counter-productive, for FERC to take any action, either by rulemaking or by the filing of a section 206 action, in relation to the governance of the CAISO.

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*Footnotes continued from previous page*

[98] See, *Bylaws of California Independent System Operator Corporation*, Article IV, Sec. 2.

## V. CONCLUSION

The CPUC appreciates the opportunity to comment on these important issues and urges the FERC to act in accordance with our comments.

Respectfully submitted,

LIONEL WILSON
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By: /s/ LISA-MARIE SALVACION

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April 21, 2008

## CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served electronically according to Rule 385.2010(f) of the Commission's Rules of Practice and Procedure.

Dated at San Francisco, California, this 21st day of April, 2007.

/s/ LISA-MARIE SALVACION

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LISA-MARIE SALVACION

# ATTACHMENT A

**CPUC Comments**
**Docket No. RM07-19-000; AD07-7-000**

# California Demand Response: A Vision for the Future[1]

Joint statement by the staff of the California Energy Commission, California Public Utilities Commission, and California Independent System Operator, Inc.

## Vision Statement

All California electricity consumers have the opportunity and capability to adjust their usage in response to time-varying signals reflecting economic, reliability or environmental conditions.

## Definition

DEMAND RESPONSE allows end-use electric customers to reduce their electricity usage in a given time period, or shift that usage to another time period, in response to a price signal, a financial incentive, an environmental condition or a reliability signal.

Demand Response Provider/Curtailment Service Providers may sponsor demand response programs and sell the demand response load to utilities and/or the CAISO, but are not necessarily load-serving entities. A Demand Response Provider may also aggregate demand and bid demand reductions or act as an agent on behalf of retail customers to the CAISO or contracts with the utilities, LSEs, ESPs, SCs, *etc.*, to aggregate retail customer load as part of a demand response program.

## Objectives

***Enhance Infrastructure and Reliability***

- Numerous and diverse customers voluntarily reducing or shifting their demand in response to economic signals is preferable to controlled outages during power system emergency situations
- Timely demand response (within seconds, minutes or hours) from customers can defer the need for investment in generation, transmission, and/or distribution
- Cost-effective demand response should be used in resource planning, procurement planning, and help satisfy operating reserve requirements
- Demand response can be used to maintain grid and market reliability, ease delivery constraints, used on a locational or regional basis to improve system reliability, meet emergency system needs and reduce electricity costs.
- Demand response can provide a market for renewables to meet load that has been shifted to off-peak when some intermittent renewable resources are more coincident.
- Technologies to enable demand response may also provide other customer service benefits including outage detection and management, power quality management, increased energy efficiency and other information capabilities

***Manage Electricity Costs***

- Demand response can give customers an opportunity to reduce their energy costs by adjusting their usage in response to time variant retail prices
- Customers should have the opportunity to benefit from providing demand response

[1] This is the latest publically vetted version of the Draft Vision Statement. The Draft Vision Statement is a CPUC, CEC and CAISO joint staff work product which has not, as yet, been adopted by any of the aforementioned entities. Staff is currently working to revise this draft before it is submitted for approval and adoption by the CAISO, CEC and CPUC. This document is being provided as an example to illustrate the interagency efforts to promote demand response in California.

- Demand response tariffs dynamically incorporate the cost of providing electricity service, thereby encouraging consumers to adjust their usage and lowering overall wholesale electricity costs for all customers
- Timely demand response can help mitigate wholesale market power and ensure reasonable prices
- To encourage demand response, LSEs should design and offer retail rates that dynamically incorporate the marginal cost of providing electricity service
- Demand response activities and infrastructure should be designed to be cost-effective from a societal perspective

***Reduce the Environmental Impact Caused by Electricity Usage***

- Demand response can reduce consumer electricity usage during peak periods when the least efficient generation units would be operating, thereby reducing greenhouse gas and other air emissions
- Demand response via permanent load shifting can help integrate intermittent, non-peak time, renewable resources into the electric grid
- The agencies' definition of demand response does not include or encourage switching to use of fossil-fueled emergency backup generation

## Goals and Principles

***Consumer Education and Customer-Oriented Design***

- Electric consumers in California should be made aware of the time-variable nature of electricity costs and of general steps they can take to help lower those costs
- All customers that desire it should be able to easily access their information about their own electricity use with the option for hourly or more frequent information and with the option to share their information with a demand response provider, of their choosing
- Demand response should be designed to be customer-friendly, simple, and easy to understand

***Ability to Participate in Dynamic Pricing and Dispatchable Programs***

- Dynamic pricing tariffs should be made available for all customers, thereby allowing customers to manage their usage in response to appropriate price signals
- All customers should also have the option to participate voluntarily in demand response where they can provide demand reductions as a dispatchable resource, including:
    1. In ISO markets: real-time, day ahead, day-of, emergency, and ancillary services
    2. In retail markets: utility programs including direct load control, controllable thermostats, and other demand response automatically communicating systems that are based on an open communications architecture and support residential, commercial and/or industrial consumers' ability to provide load reductions

***Technologies and Infrastructure***

- All customers should be provided cost-effective advanced metering systems capable of supporting time varying tariffs with metering done on an hourly basis or better, and with minimal hardware upgrades necessary to participate in various dynamic pricing tariffs
- Any advanced metering systems should support the ability to automatically retrieve data information and provide the customer with timely access to this retrieved data
- All residential customers should be enabled through communications media interfaces to remotely control devices in their home area network[2] and manage their energy usage. Furthermore, customers who choose to should be able to conveniently access their usage information using communications media (*e.g.*, over the internet, via on-site devices, or other means chosen by the customer)

[2] A home area network is a network contained within a user's home that connects a person's digital devices, from multiple computers and their peripheral devices to telephones, home entertainment units, home security systems, smart appliances and other digital devices that are wired into the network.

- The broadest possible range of metering and communications technologies, that are compatible with Title 24 devices, which can enable demand response should be encouraged, provided that all technologies should be compatible with utility billing and other back-office systems
- Advanced metering infrastructure, automated demand response and direct load control should be encouraged to provide customers with the opportunity to reduce usage with minimal intrusion and effort. Proliferation of user friendly technologies will have beneficial effects on grid reliability and operation
- The use of a smart grid allows for greater implementation of demand response. Smart grid technologies provide real-time information on the transmission and the distribution level that can enable efficient use of demand response resources, offset grid enhancements, increase the visibility of customer usage to ISO, LSE and ESPs and overall grid stability
- State building code (Title 24) updates provide a cost-effective opportunity to introduce demand response technologies during the construction of new buildings or renovation of existing buildings

***Demand Response in the Wholesale Market***

- Market rules, including technical and operational standards, should not limit the ability for demand to bid directly into the wholesale market, including into capacity, ancillary services and energy markets
- Market rules should allow for small load to be aggregated and bid into the wholesale market
- Load serving entities and demand response providers should be able to freely participate and compete directly in the wholesale market
- Demand response providers should have access to customer data, with appropriate confidentiality protection, to enable the development and implementation of demand response products that meet customer needs
- Demand response should be treated as a resource for planning and procurement purposes
- Demand response participants should be given appropriately aligned wholesale market pricing signals, which incorporate locational marginal prices
- The demand response market shall be appropriately structured to ensure competitive participation while protecting California's ratepayers

***Investor-Owned Utility (IOU) Issues***

- IOUs should incorporate demand response resources into their overall procurement portfolio and as a portion of their reserve requirements
- IOUs should treat demand response resources similar to other resources in their procurement portfolio when considering a mix of resources necessary to satisfy their load-serving obligation
- All IOU demand response efforts should be periodically evaluated to determine past performance and improve future effectiveness
- IOUs should competitively procure demand response resources in an open and competitive demand response market

***Coordination between CPUC, CEC and CAISO***

- Effective demand response efforts will require coordination among the agencies promulgating this vision statement
- The CAISO will follow FERC Order 890 in coordinating transmission planning as it relates to considering demand response resources
- Coordination will also be necessary related to:
    - IOU procurement planning
    - IOU rate design modifications, either in general rate cases, or separate venues
    - Energy efficiency (and other public purpose) programs
    - Other peak demand reduction programs
    - ISO efforts to develop transparent wholesale market pricing mechanisms
- Changes to ISO market rules to allow additional participation by non-IOU demand response providers
- Necessary legislative changes to rationalize rate design structures